
1997 Wis Eth Bd 2
BOARDS, COMMISSIONS AND AGENCIES;
IMPROPER USE OF OFFICE

The Ethics Board advises that a state public official associated with a state agency (1) not invest in a privately owned company unless the investment opportunity has been offered independent of the official's public position and (2) not use information gained through the official's public position, that is not available to the public, or has not been made public, as a substantial basis for the official's personal investment in a privately owned company.

The Ethics Board also recommends that other individuals associated with the agency follow this advice. (June 27, 1997)

Facts

¶ 1. This opinion is based upon these understandings:

- a. You write on behalf of a state agency, of which you are legal counsel.
- b. The agency does business with a privately owned company.
- c. The company has offered an appointed official of the agency an opportunity to invest \$25,000 in the company.
- d. The investment opportunity is not available to the public.
- e. There is little public information about the company, and the official has obtained most of the official's knowledge about the company through the official's position at the agency.
- f. The official has responsibilities to monitor the agency's contract with the company.

Questions

¶ 2. The Ethics Board understands your questions to be:

1. Do laws administered by the Ethics Board restrict the ability of the official to invest in the company?

2. If the official invests in the company, would the official be disqualified from fulfilling the official's oversight responsibilities?

Discussion

¶ 3. The provisions of the Ethics Code most applicable to your questions are §§19.45(2) and (4) and 19.46(1)(b), *Wisconsin Statutes*.

Use of office to obtain something of substantial value

Reduced to their elements, §§19.45(2) and 19.46(1)(b), *Wisconsin Statutes*, provide:

No state public official
May use his or her office or position
To obtain anything of substantial value
For the official's private benefit
Or to produce
A substantial benefit for the official.¹

Officials of the agency on whose behalf you have written appointed by the governor are state public officials.²

¹ Section 19.45(2), *Wisconsin Statutes*, provides:

19.45 (2) No state public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated. This subsection does not prohibit a state public official from using the title or prestige of his or her office to obtain contributions permitted and reported as required by ch. 11.

Section 19.46(1), *Wisconsin Statutes*, provides:

19.46 (1) Except in accordance with the board's advice under sub. (2) and except as otherwise provided in sub. (3), no state public official may:

* * *

(b) Use his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for the official, one or more members of the official's immediate family either separately or together, or an organization with which the official is associated.

² Section 19.42(13)(a), *Wisconsin Statutes*, provides:

19.42 (13) "State public office" means:

(a) All positions to which individuals are regularly appointed by the governor, except the position of trustee of any private higher educational institution receiving state

¶ 4. The question arises whether the opportunity being offered to make an investment in a privately held company is something of substantial value (§19.45(2)) or a substantial benefit (§19.46(1)(b)). We think it is. “Anything of value,” as used in the statute, includes money, property, a favor, or a service. §19.42(1), *Wisconsin Statutes*. The ordinary meaning of “benefit” includes “advantage.” Webster’s Ninth New Collegiate Dictionary (1983). The opportunity to invest in a private company, not available to others, is a favor or service and an advantage, even if one pays a fair value for the investment. This is consistent with prior opinions of the Ethics Board in which we have said that “anything of value” could include entrance into a partnership or the matching of venture capital. 5 Op. Eth. Bd. 87 (1982); 4 Op. Eth. Bd. 73 (1980). Moreover, the investment opportunity appears to be of substantial value as contrasted with something of mere token or inconsequential value. 1995 Wis Eth Bd 5 ¶6; 1993 Wis Eth Bd 08 ¶6; 7 Op. Eth. Bd. 1 (1983); 5 Op. Eth. Bd. 97 (1982).

¶ 5. With respect to state public officials associated with the agency, the next issue is whether acceptance of the offer to invest in the privately held company is a use of public office or position. The Ethics Code, §19.45(1), *Wisconsin Statutes*, recognizes that state public officials retain their rights as citizens to personal economic interests and may need to engage in private business activities and maintain personal investments.³ However, the offer of the investment opportunity to the official appears to arise from the official’s position at the agency. By accepting an offer accorded because of a state public office or position, an official of the agency would use his or her position. Accordingly, we recommend that an official of the agency not accept a business opportunity unless the official can demonstrate that it is being offered independent of, and unrelated to, holding office. 1992 Wis Eth Bd 32 (employment opportunity); 1992 Wis Eth Bd 18 ¶3 (service on corporate board of directors).

appropriations and the position of member of the district board of a local professional baseball park district created under subch. III of ch. 229.

Section 19.42(14), *Wisconsin Statutes*, provides:

19.42 (14) “State public official” means any individual holding a state public office.

³ In the past, the Ethics Board has said there is no general prohibition in the Ethics Code that would bar a state official’s participation in business ventures, but has indicated that specific circumstances could prohibit such participation. 1991 Wis Eth Bd 3 ¶4; 5 Op. Eth. Bd. 87 (1982); 4 Op. Eth. Bd. 73 (1980).

Use of confidential information

¶ 6. Section 19.45(4), *Wisconsin Statutes*, reduced to its elements, provides:

No state public official
May intentionally use
Information gained by reason of his or her official position
In any way that could result in the receipt of anything of value
If the information is not public information.⁴

You have indicated that most of the information about the company offering the investment opportunity is not publicly available. Rather, the information was made available to the agency's officials in connection with their responsibilities to the agency. If this information is not available to the public or has not been made public, then it would be improper for a state official associated with the agency to use that information as a substantial basis for his or her personal investment in a privately owned company in which the investment opportunity is not available to the public.

Disqualification and duty of undivided loyalty

¶ 7. Because we advise that state public officials associated with the agency not accept the investment opportunity that has been offered, we need not address the question concerning how that investment would affect the official's ability to decide issues that might arise at the agency involving the privately owned company.

Advice

¶ 8. The Ethics Board advises that a state public official associated with a state agency (1) not invest in a privately owned company unless the investment opportunity has been offered independent of the official's public position and (2) not use information gained through the official's public position, that is not available to the public, or has not been made public, as a substantial

⁴ Section 19.45(4), *Wisconsin Statutes*, provides:

19.45 (4) No state public official may intentionally use or disclose information gained in the course of or by reason of his or her official position or activities in any way that could result in the receipt of anything of value for himself or herself, for his or her immediate family, or for any other person if the information has not been communicated to the public or is not public information.

basis for the official's personal investment in a privately owned company.

We also recommend that other individuals associated with the agency follow this advice.

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